



GAO

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Decision

Matter of: Aulson & Sky Company

File: B-290159

Date: May 21, 2002

Song Fong Eui, Esq., for the protester.

Maj. David T. Crawford, and Raymond M. Saunders, Esq., Department of the Army, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer reasonably determined that the protester was nonresponsible and, therefore, ineligible for award where the pre-award survey revealed that the protester's recent record of past performance of construction-type requirements included repeated delays in contract performance.

DECISION

Aulson & Sky Company protests the award of a contract to Dura Corporation Ltd. under request for proposals (RFP) No. DAJB03-02-R-0021, issued by the United States Army Contracting Command Korea, Department of the Army, for repair and turnover maintenance of family housing in Seoul, Korea. Aulson challenges the agency's determination that the firm was nonresponsible, based on its record of past performance, and, therefore, ineligible for award.

We deny the protest.

The RFP, issued on December 12, 2001, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a base period and four 1-year option periods. The RFP stated that the award would be made to the responsible offeror whose proposal represented the best value to the government, considering (in descending order of importance) past performance,¹ technical capability

¹ Under the past performance evaluation factor, the RFP stated that the agency would evaluate the risks and strengths identified with an offeror's recent, current, (continued...)

(contract management, quality control plan, accident prevention/safety plan, and mobilization/transition), and price. The RFP stated that past performance and technical capability, when combined, would be considered significantly more important than price; however, as proposals became more equal in terms of past performance and technical capability, price would become more important. The RFP also provided that the agency reserved the right to make award to other than the firm proposing the lowest price. RFP at 9-12.

In addition, and as relevant here, the RFP included a clause captioned “Notice of Evaluation of Past Performance,” which provided that as part of the responsibility determination, the contracting officer would evaluate past performance to determine the offeror’s capability to perform the contract. RFP at 25.

Fifteen firms, including Aulson (a Korean-owned business concern) and Dura (the incumbent contractor) submitted proposals by the closing time on January 18, 2002. The agency’s technical evaluation board (TEB)² evaluated proposals. The proposals of Aulson and Dura were evaluated as follows:³

	Aulson	Dura
Past Performance	Average	Outstanding
Technical Capability	Good	Outstanding

Agency Report (AR), Tab 9, Technical Evaluation Report, at 2. Aulson’s proposed price was lower than Dura’s proposed price.

In the technical evaluation report sent to the contracting officer, who served as the source selection authority, the TEB explained that while Aulson had many past performance records with the federal government, its past performance was primarily in the areas of construction and civil work, not turnover maintenance of family housing units. Accordingly, the TEB identified as a weakness Aulson’s lack of experience directly relevant to the requirements of this RFP. AR, Tab 9, Technical Evaluation Report for Aulson, at 4. Regarding technical capability, the TEB

(...continued)

and relevant contract performance. An offeror’s proposal would receive one of the following overall past performance confidence assessment ratings: outstanding/high confidence; good/significant confidence; average/confidence; marginal/little confidence; and unacceptable/no confidence.

² In its comments on the agency report, Aulson expresses concern that there may not have been any engineers on the TEB. The unredacted technical evaluation report furnished to our Office shows that there were engineering, as well as housing, representatives on the TEB.

³ The proposals of the other 13 offerors were rejected as technically unacceptable.

concluded that Aulson satisfied the minimum requirements for contract management, quality control plan, and accident prevention/safety plan; however, the TEB was concerned that while Aulson addressed mobilization/transition, Aulson did not fully understand the RFP requirement since its proposed equipment breakdown was not feasible in terms of supporting the requirement. Id.

The contracting officer subsequently requested pre-award surveys for Aulson and Dura; the surveys were performed by the agency's Quality Assurance Branch (QAB), which reviewed the offerors for responsibility based on technical capability, quality assurance capability, financial capability, and past performance. The QAB determined that Dura was responsible, but that Aulson was not responsible based on its recent record of past performance. More specifically, the QAB reported that Aulson was currently performing contracts in Korea and had encountered schedule delays.

For example, in December 2001, despite receiving an overall satisfactory rating for its performance of contract No. DAJB03-01-C-0121 (barracks upgrade and renovation at Camp Carroll, Korea), Aulson received a letter from the contracting officer dated December 10, 2001, in which the contracting officer expressed concern to Aulson that progress schedules had been modified more than once (i.e., three times in a 60-day period) and that the project was behind schedule, even though Aulson's revised schedule indicated that the deadline for completion would be met. In addition, the contracting officer advised Aulson to raise engineering plan and service section issues within a reasonable time with the contracting officer's representative. The contracting officer concluded by stating that the referenced matters could endanger Aulson's contract performance. AR, Tab 15, Letter from Contracting Officer to Aulson (Dec. 10, 2001).⁴ As requested, by letter dated December 18, Aulson responded to the contracting officer's concerns, acknowledging that "for the subject contract, we have had some difficulty in adapting ourselves to the typical regional differences . . . [i]n fact, the initial preparation work took longer than we planned[;] [m]oreover, the terror on [September 11, 2001] ha[d] further delayed the overall performance for about a month." AR, Tab 16, Letter from Aulson to Contracting Officer (Dec. 18, 2001). Aulson provided a written plan for correcting noted deficiencies and for preventing the recurrence of such problems, including closer supervision of work progress; Aulson also promised "not to revise the 'revised-revised' schedule." Id. On January 30, 2002, the contracting officer met with Aulson personnel to discuss on-going schedule delays and to request an updated

⁴ The record shows that the agency took responsibility for some of Aulson's performance problems under the Camp Carroll contract as a result of government delays in the processing of personnel, material, and equipment access passes and as a result of differing site conditions. AR, Tab 7, Pre-award Survey for Aulson, Spreadsheets at 1.

progress schedule; Aulson promised compliance with the original contract completion deadline. AR, Tab 17, Contracting Officer's E-mail and Notes of Meeting.

As another example, in assessing Aulson's performance under contract No. DAJB03-02-C-0019 (barracks upgrade and renovation at Camp Stanton, Korea), the contracting officer's representative assigned an overall unsatisfactory rating to Aulson for its performance in December 2001, noting that the quality and conduct of work, the adequacy of contractor inspections, the adherence to work or delivery schedules, and the adequacy of personnel were unsatisfactory; the contracting officer's representative commented that Aulson needed a qualified safety engineer present at all times of operation and needed increased manpower and material. AR, Tab 19, Form 173-R, Aulson's Performance Rating for Dec. 2001. In January 2002, the agency met with Aulson personnel to stress the importance of staying on schedule and to request an action plan to bring the firm back on schedule. AR, Tab 7, Pre-Award Survey for Aulson, Spreadsheets at 2. The contracting officer's representative, while assigning an overall satisfactory rating to Aulson for its performance in January 2002, nevertheless assigned individual unsatisfactory ratings to the firm in the areas of resolution of delays and submission of updated and revised progress schedules. AR, Tab 20, Form 173-R-E, Aulson's Performance Rating for Jan. 2002.

Based on Aulson's record of past performance for recent contracts in Korea, the QAB recommended that no award be made to Aulson. AR, Tab 7, Pre-Award Survey for Aulson, at 2.⁵ In contrast, the QAB recommended that the award be made to Dura, the incumbent contractor determined responsible in all areas surveyed. AR, Tab 6, Pre-award Survey for Dura, at 2. On February 15, the contracting officer awarded the contract to Dura, the responsible offeror whose proposal was determined to represent the best value to the government.

Aulson protests the nonresponsibility determination that made the firm ineligible for award. In this regard, Aulson claims that "most" of the schedule delays under its contract at Camp Carroll were caused by the government, and that despite these delays, it will finish the contract on time. Comments at 2.⁶ Aulson believes that it should have been found responsible, and as the offeror submitting the low-priced, technically acceptable proposal, it should have received the award.

⁵ The Small Business Administration's certificate of competency procedures do not apply to foreign-owned business concerns, such as Aulson, even if these concerns are small businesses. See Federal Acquisition Regulation § 19.601(e).

⁶ We note that Aulson neither comments on its record of past performance at Camp Stanton nor makes any claims that the government caused any of the delays under this contract.

In making a responsibility determination, a contracting officer is vested with a wide degree of discretion and, of necessity, must rely upon his or her business judgment in exercising that discretion. See Blocacor, LDA, B-282122.3, Aug. 2, 1999, 99-2 CPD ¶ 25 at 4. We generally will not question a negative determination of responsibility unless the protester can demonstrate a lack of any reasonable basis for the contracting officer's determination. Id. Here, Aulson has failed to make the required showing.

As discussed above, the record shows that the agency had a reasonable basis for concern regarding Aulson's performance under two construction-type contracts recently performed by the firm in Korea. For example, for the contract at Camp Carroll, the contracting officer issued a letter of concern to Aulson, pointing out, among other things, that the schedule had to be modified a number of times in a short timeframe and that the project was behind schedule, even though Aulson believed it would finish by the contract completion date; the contracting officer also met with Aulson regarding on-going schedule delays and to request an updated progress schedule. Other than disagreeing with the agency's assessment of the cause of the performance delays, Aulson does not meaningfully rebut its past performance record at Camp Carroll and, in fact, admits responsibility for delays related to startup and initial preparation work. Moreover, Aulson is silent regarding its performance record at Camp Stanton, as described above. On this record, we have no basis to question the reasonableness of the contracting officer's conclusion that Aulson was not responsible in terms of being capable to perform the RFP's requirements.⁷

The protest is denied.⁸

Anthony H. Gamboa
General Counsel

⁷ In the legal memorandum accompanying the agency report, there is a reference to a third contract allegedly performed by Aulson, this one at Camp Hovey, Korea. The contemporaneous past performance documentation included in the agency report shows, however, that the Camp Hovey contract was performed by another contractor, not Aulson. AR, Tab 7, Pre-Award Survey for Aulson, Spreadsheets at 3. The agency subsequently addressed this discrepancy, acknowledging that Aulson was not the contractor at Camp Hovey, and correctly pointing out, as confirmed by our review, that any delays under the Camp Hovey contract were not attributed to Aulson.

⁸ To the extent Aulson challenges the evaluation of its technical proposal and the agency's decision to pay a price premium to Dura, Aulson is not an interested party to challenge these matters because, in light of our decision that the contracting officer reasonably determined the firm nonresponsible, Aulson would not be in line for award in any event. See Blocacor, LDA, supra, at 3 n.4.